

TAX DIVISION
ALTERNATIVE DISPUTE RESOLUTION
CASE SELECTION CRITERIA

Alternative Dispute Resolution ("ADR"), as used here, is any non-binding dispute resolution process facilitated by a third-party neutral, whether or not appointed by a court. The Tax Division presently resolves a large number of its cases through settlements negotiated through traditional two-party negotiation and believes that it will continue to do so. ADR is not meant to replace traditional negotiation, but rather to provide attorneys with additional tools that may facilitate negotiation of settlement where traditional two-party negotiation has not produced an acceptable resolution or where the presence of a third party may cause negotiations to proceed more quickly or efficiently.

One of the advantages of ADR is that it gives the parties to a dispute the flexibility to fashion their own procedures for resolving the dispute. There are almost as many kinds of ADR as there are parties and disputes. Thus, in evaluating whether ADR processes may be useful, there are no hard and fast rules. Attorneys should begin considering whether ADR might be helpful in a particular case at the beginning of the litigation and should continue to revisit the question throughout the progress of the case. Such analysis must take account of the ADR processes that may be available through or imposed by the court

in a particular district or circuit.¹/Attorneys also should keep in mind that many different kinds of ADR are available both through the courts and independent of the courts. Some forms of ADR may be more useful than others at particular points in the litigation. For example, early neutral evaluation, a process whereby a third-party neutral evaluates each side's case and helps the parties agree on the most efficient method of exchanging factual material, is most appropriate at the beginning of litigation and can be a useful tool in quickly obtaining a better understanding of the strengths and weaknesses of your case. By contrast, mediation, a process where a third party facilitates negotiation between the parties, may be most useful after the case has been more fully developed.

This statement on ADR relates to the government's voluntary participation in ADR. Nothing herein shall be construed to limit the government's duty to participate in ADR pursuant to court order or applicable local rules, except that Tax Division attorneys shall resist participation in ADR, by appropriate motion, whenever said participation would violate the U.S. Constitution or other governing law or would not be in the best interest of the United States.

¹/ The taxpayer should be required to provide a waiver of 26 U.S.C. § 6103 as a condition of the government's agreement to participate in ADR other than ADR imposed by the Court. In the absence of such a waiver, the Government might not be able to make a full factual disclosure to the third-party neutral which would substantially undermine the utility of the ADR process.

This statement shall not be construed as creating any right, or benefit, substantive or procedural, enforceable at law or in equity, by a party against the United States, its agencies, its officers, or any other person. This statement shall not be construed to create any right to judicial review involving the compliance or noncompliance of Tax Division attorneys with its terms.

The following is a list of factors to assist attorneys in the Tax Division in determining whether to use ADR in a particular case.^{2/} Not all listed factors will have relevance in any given case and factors not listed below may also be present that weigh in favor of or against the use of an ADR process.

FACTORS FAVORING ADR

1. The case involves largely factual issues and the legal principles are well established (e.g., valuation cases, substantiation cases, trust fund recovery cases).

2. The case is legally and/or factually complex.

3. The case involves multiple independent factual issues (e.g., bankruptcy cases).

4. The case is one where there is a particular need for a prompt resolution of the dispute (e.g., summons, estate tax and bankruptcy cases).

^{2/} Many of these factors are equally applicable in determining whether a case should be settled using traditional, unassisted negotiations.

5. The case is one where a consensual resolution may lead to greater future compliance (e.g., employee-independent contractor cases).

6. A settlement in the case would be based solely on collectibility.

7. The other party has a particular need to keep information confidential (e.g., financial information or trade secrets).

8. There are problems perceived either with respect to the decisionmaker or the forum, for example:

- a. The judge is particularly slow in resolving cases;
- b. The docket is backlogged with criminal and/or civil cases;
- c. There is the potential for jury nullification.

9. The case is one where the Government will be required to litigate in a forum other than a federal court.

10. The case is one where the nature or status of a party to the dispute might, in itself, influence the outcome of the litigation (e.g., sympathetic plaintiff).

11. The case is one where there are substantial litigating hazards for both parties.

12. The case is one where trial preparation will be difficult, costly and/or lengthy and the expected out-of-pocket and lost opportunity costs outweigh any benefit the government can realistically expect to obtain through litigation.

13. The case is one where it is desirable to avoid adverse precedent.

14. The case is one where either the party or the attorney may have an unrealistic view of the merits of the case or an unreasonable desire to litigate, with insufficient regard for what may be in the client's best interest.

15. The case is one where the other party has expressed an interest in using ADR.

16. The case is one where the working relationship between the parties or their counsel suggests that the intervention of a neutral third-party would be beneficial.

17. The case is one where traditional negotiations will be difficult and protracted.

18. The case is one where the progress of settlement discussions may be improved by a third-party neutral's ability to conduct frank, private discussions with each of the party.

FACTORS DISFAVORING ADR

1. Taxpayer's case clearly has no merit (e.g., certain Bivens cases or protestor suits).

2. The case is one that should be resolved on motion, such as a motion to dismiss or for summary judgment.

3. The case presents an issue where legal precedent is needed, for example:

a. Issue involved is of national or industry-wide significance;

b. Issue is presented in a substantial number of cases;

c. Issue is a continuing one with same taxpayer.

4. The importance of the issue involved in the case makes continued litigation necessary despite some adverse precedent.

5. The information presently available about the case is insufficient to evaluate meaningfully the issues involved or settlement potential.

6. The case involves significant enforcement issues, for example:

a. Case involves protestors;

b. Case is high profile and will involve publicity which could encourage taxpayer compliance;

c. Case involves a uniform settlement position (e.g., shelter cases).

7. The case involves a constitutional challenge.

8. The case is one where government concession is under consideration.

9. The case is one which is very likely to settle through traditional negotiations within a reasonable time after the facts have been ascertained, without a third-party neutral.

10. The case is one where Court imposed scheduling makes use of ADR impractical (e.g., "rocket-dockets").

11. The case is one where the other party has already engaged in ADR at the agency level.^{3/}

^{3/} For purposes of this factor, normal agency administrative procedures, such as appellate conferences or administrative claims review, are not considered to be ADR procedures.

12. The case involves 26 U.S.C. § 6103 information or privileges which would prevent open discussions with a third-party neutral, e.g., case involving request for third-party return information.